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JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 320

ROBERT W. JAFFKE, *Petitioner*,

v.

WILLIAM C. DUNHAM, *Trustee* of the Estate of Robert L. Knetzer, Bankrupt, *Respondent*.

PETITION FOR REHEARING

WILLIAM M. GIFFIN
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Attorney for Petitioner.

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PETITION FOR REHEARING

To the United States Supreme Court and the Justices Thereof:

Robert W. Jaffke, petitioner in the above entitled cause, presents this, his Petition for Rehearing after denial of certiorari as governed and prescribed by Rule 58 of Revised Rules of Supreme Court, effective July 1, 1954, and in support thereof, respectively shows:

I.

SUMMATION OF THE ACTIVITY OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THIS CAUSE.

On January 13, 1956, the Court of Appeals filed its initial opinion and its judgment order which reversed the Trial Court's judgment and remanded the cause to the Trial Court for further proceedings consistent with the views expressed in its opinion, then, on February 13, 1956, the court entered an order changing the remand portion of the judgment order by deletion of the words "for further proceedings consistent with the views expressed in this opinion," and added the words "with instructions to enter judgment for the respondent-appellant." (PETITION FOR WRIT OF CERTIORARI — 16a, SUPREME COURT RECORD, PAGE 202.) No Petition for Rehearing had been filed nor no rehearing of the cause had been held prior to the amendment of the judgment order as the respondent had filed a Motion to Modify Judgment, or in the alternative, Motion for Clarification of Opinion and Judgment. This motion was based on the ground that since the entering of the opinion in the Court of Appeals the presiding Judge in the Trial Court had died, that both of the parties had had their day in Court and had presented all the available evidence, and that to further prolong the litigation would unduly hamper the closing of a bankrupt estate. (SUPREME COURT RECORD 187-188.)

A motion to modify an appellate judgment must be based on good and sufficient grounds; otherwise, it should be denied. Here, the motion was manifestly lacking in merit as the only ground was the untimely death of the trial judge and not a legal basis for a modification of a judgment. This arbitary action of the Court of Appeals had the effect

of denying petitioner an opportunity to file a Petition for Rehearing as petitioner was required to file an Answer to the Motion to Modify and under the rule of that Court, the fifteen (15) day limitation period for the filing of a Petition for Rehearing had expired.

Not only was it unfortunate that petitioner was deprived by this amended order of an opportunity for further proceedings in the Trial Court, but he faced the further dilemma that he had raised in his Answer the point of a cross-appeal and argued that it was not necessary for a cross-appeal to be filed in the Court of Appeals for that Court to consider all evidence in the record. Thus, petitioner had cited to the Court of Appeals the same authority on the question that this Honorable Court set forth in its opinion in this cause which reversed the Court of Appeals' decision on that point of law. (SUPREME COURT RECORD, PAGE 195, 189-201.)

On May 28, 1956, this Honorable Court entered its order allowing Certiorari, (SUPREME COURT RECORD, PAGE 202) and on January 14, 1957 reversed the opinion of the Court of Appeals and remanded this cause to the Court of Appeals for the consideration of the admissibility and weight of an affidavit without a cross-appeal and whether or not relevant admissible evidence established a constructive trust. (PETITION FOR CERTIORARI 19a-20a.) On remand from this Honorable Court, the Court of Appeals did not grant a rehearing of the cause, but only requested of the respective counsel of the parties herein that suggestions in typewritten form, be submitted to the Court on the questions of the admissibility of the affidavit and the establishment of a constructive trust. It can be fairly stated that at the time of oral argument in this Honorable Court, counsel considered mentioning the hope-

lessness of petitioner's cause in the event that this Court should reverse the case with a remandment for further consideration in the Court of Appeals. It had become apparent from its action that the Court of Appeals, without regard for Petitioner's legal rights, was determined to reverse the judgment of the Trial Court. The reinstatement of its prior reversal substantiates that viewpoint.

II.

THE EQUITIES OF THE CASE

On December 1, 1952, petitioner initiated this proceeding when he filed a Petition for reclamation in the subject bankruptcy naming Robert L. Knetzer individually, and William C. Dunham, Trustee of the estate of Robert L. Knetzer, a bankrupt, as respondents therein. The Petition was heard and evidence taken on the 14th and 15th days of October, 1954, and the case proceeded against the sole respondent, William C. Dunham, as Robert L. Knetzer died on August 26, 1953. (SUPREME COURT RECORD, PAGE 35.) On April 18, 1955, the Trial Court entered its findings of fact, conclusions of law and judgment ordering petitioner recover of the respondent the sum of $27,400.00. The first conclusion of law of the Trial Court held that courts of bankruptcy proceed upon equitable principles, and the equities in this case are with the petitioner. (SUPREME COURT RECORD 166.) Hence, as the successful party in the Trial Court, petitioner has been involved in litigation for a period of five (5) years, two and one-half (2½) years of which time has been spent in an Appeal Court in an endeavor to sustain his judgment.

Unquestionably, this is a unique case, particularly, where a trustee in bankruptcy as an officer of the bankruptcy court spends two and one-half (2½) years in litigation for the

purpose of reversing its order. Respondent-Trustee further seeks to retain intact funds received from the bankrupt as payments under a turn-over order which payments the bankrupt was permitted to make in installment payments over a long period of time. (SUPREME COURT RECORD 86-87.) A turn-over order is an adjudication that a bankrupt has in his possession at the time of the entry of the order, certain assets that he is withholding from his trustee. It does not include property that the bankrupt obtained from other persons after his adjudication in bankruptcy.

A Bankruptcy Court is a court of equity and is guided by equitable principles as the trial court concluded. A petition seeking a return of property in the possession of a trustee in bankruptcy calls for the weighing of the equities of the respective parties. It is a contest of title and the mere fact that the trustee is in possession of the property in question does not render him an advantage as he succeeds only to the title held by the Bankrupt. During the period covered by this cause, the Bankrupt Knetzer was never charged with an offense under the Bankrupty Act by the respondent trustee; therefore, the conduct of the Bankrupt during the period in question from December 7, 1950 to November 1, 1951 weighs heavily against the equities of the respondent.

When this Court determines that a Court of Appeals has applied an incorrect principle of law, wise judicial administration normally counsels remand of the case to the Court of Appeals which this Honorable Court did; however, where the record is slim and the relevant standards are not difficult to apply, this Court in the interest of substantial justice can reconsider the sufficiency of the evidence as justice may require. *J. J. O'Leary vs. Brown, Pacific, Maxon,*

Inc., et al., 340 U.S. 504, 95 L. Ed. 483. This Court in the case of *United States vs. Ohio Power Company*, 353 U.S. ——, 1 L. E. 2nd 683, on the question of interest in finality of litigation yielding to the interest of justice held that a petition for rehearing should be considered even though certiorari had been previously denied. Petitioner's short lived victory in the trial court has been a costly one. The equities lie with Petitioner in this cause. Equity and justice cogently demand a reconsideration of the cause by this Honorable Court.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for a Rehearing be granted and that the Petition for Certiorari be given further consideration.

Dated November 5, 1957.

Respectfully submitted,
WILLIAM M. GIFFIN
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I, counsel for the above named petitioner, do hereby certify that the foregoing Petition for a Rehearing of this cause is not presented for the purpose of delay or vexation, but is presented in good faith and is well founded in law and in fact and proper to be filed herein.

Counsel for Petitioner.

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